



Comptroller General
of the United States

Washington, D.C. 20548

Vickers

Decision

Matter of: Power Engineering Contractors, Inc.

File: B-241341

Date: February 6, 1991

Wyman G. Smith, III, Esq., Gaw, Van Male & Smith, for the protester.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prospective bidder's failure to receive solicitation amendment does not warrant disturbing the award where there is no allegation that the cause of the failure was the result of a deliberate attempt by the contracting agency to exclude the bidder or the result of deficiencies in the contracting agency's solicitation process.

DECISION

Power Engineering Contractors, Inc. protests the rejection of its low bid submitted in response to invitation for bids (IFB) No. F04689-90-B-0005, issued by the Onizuka Air Force Base, California, as nonresponsive for failing to acknowledge amendment 0002 to the IFB. Power Engineering contends it never received the amendment.

We deny the protest.

The IFB, for work on two portable generators, was issued on August 8, 1990, with a scheduled bid opening date of September 7. Amendment 0001 was issued on August 16, and a site visit was conducted on August 22. As the result of questions raised at the site visit, amendment 0002 was issued on August 28, which changed some of the drawings and contained clarifications to parts of the specifications. Three bids were received on the September 7 bid opening date. Two of the three bids acknowledged receipt of amendment 0002. Power Engineering, which failed to acknowledge amendment 0002, submitted the low bid of \$283,300. The second-low bid was

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from Lilja Industrial Construction Corporation at \$286,630. Since the contracting officer believed the amendment to be material, Power Engineering's bid was rejected as nonresponsive and award made to Lilja on September 18.^{1/} Power Engineering protests the rejection of its bid because it states it never received the amendment as the Air Force probably never mailed it.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods for the dissemination of solicitation documents to prospective competitors. See Ktech Corp., B-240578, Dec. 4, 1990, 90-2 CPD ¶ _____. In particular, the government is required by regulation to add to the solicitation mailing list all firms that have been furnished invitations in response to their requests, so that they will be furnished copies of any amendments, unless it is known that the request was made by an entity which is not a prospective bidder. Federal Acquisition Regulation (FAR) § 14.205(c). This, however, does not make the contracting agency a guarantor that these documents will be received in every instance and, concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents, especially in a sealed bid procurement. See Fort Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. Consequently, a prospective offeror's nonreceipt of solicitation documents will not justify overturning a contract award absent significant deficiencies in the dissemination process, the failure to receive fair and reasonable prices, or a deliberate attempt by the contracting agency to exclude a particular prospective offeror, even where the late or nonreceipt has the effect of eliminating the source from the competition. Ktech Corp., B-240578, supra.

Here, the agency contract administrator states in an affidavit that on August 28, she mailed out copies of amendment 0002 to all the firms on the agency's "Solicitation Requestors list."

^{1/} The protester concedes that the amendment imposed legal obligations on the contractor not contained in the original solicitation. The fact that Power Engineering contends it had already considered these changes in its pricing does not change the materiality of the amendment. Lake City Mgmt., B-233986, Mar. 9, 1989, 89-1 CPD ¶ 259.

That list, dated August 6, sets forth 17 firms and includes the address for Power Engineering Group, Inc., in Benicia, California. The contract administrator further states that new firms not on the August 6 list were also provided copies of the amendment. The new firms were apparently added to a subsequent list dated August 29, which included the proper address for both Power Engineering Group, Inc., in Benicia, California and Power Engineering Contractors, Inc., in Palo Alto, California.^{2/} The contract administrator says that she personally typed and checked each address label, inserted the amendment into each envelope, sealed each and deposited them into the mail. Finally, she specifically states that she "addressed and mailed copies of amendment 0002 to both the Benicia and Palo Alto addresses of Power Engineering."

The protester states that neither it nor its related firm received copies of the amendment and argues that the contract administrator's declaration of what occurred is subject to question because the second "requestors list," which contained the Palo Alto address, is dated the day after the amendment was allegedly mailed.

Under the circumstances here, the Air Force fulfilled CICA's full and open competition requirement. First, the protester does not argue nor does the record show that there was any deliberate effort by the agency to exclude the protester by failing to mail the amendment. Nor do we find any evidence showing that the agency's process for sending out the amendments was deficient. We think that the statement from the contract administrator shows that reasonable efforts were undertaken to distribute the amendment. We do not agree with the protester that the fact that the second list was dated after the amendments were mailed detracts from the credibility of the contract administrator's statement. It is probable that as the list was computer generated the contract administrator mailed the amendment to all the firms on the updated list and later printed out the full list the following day. In any event, the existence of the updated list does not seem to have impacted on whether the protester received the amendment at its Benicia address was on the earlier August 6 list and the amendment was not received at that location. Finally, the agency did receive two viable bids and a reasonable price was obtained--the awardee's bid was only \$3,380 more than that of the protester's.

^{2/} Power Engineering Contractors, Inc. and the Power Engineering Group are separate but related corporations, both of which requested and received copies of the solicitation.

Under the circumstances, we see no basis to disturb the procurement. The protest is denied.

For *Ronald Berger*
James F. Hinchman
General Counsel